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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEANNETTE OLSON, Plaintiff, Appellant and Cross-Respondent, v. ARV ASSISTED LIVING, INC., Defendant, Respondent and Cross-Appellant.	D038336 (Super. Ct. No. N078547)

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

Plaintiff Jeannette Olson worked as an Activities Director for defendant ARV Assisted Living, Inc. (ARV), at its Encinitas residential care facility. Olson was discharged from employment and she sued ARV, alleging discrimination based on age and physical and mental disability. Over Olson's objection the matter was submitted to arbitration based on an agreement between the parties. The arbitrator ruled for ARV.

Olson asked the trial court to vacate or correct that ruling. The trial court affirmed the ruling and Olson appeals, arguing the arbitration agreement was invalid, ARV waived its right to arbitration and the arbitrator's award was insufficient to allow judicial review. ARV cross-appeals, arguing the trial court erred in striking the award of costs granted to it by the arbitrator.

BACKGROUND

Olson was employed by ARV. Fired, she filed a charge of discrimination with the Department of Fair Employment and Housing (DFEH), alleging discrimination on the basis of age and physical and mental disability. DFEH declined to issue an accusation and informed Olson that she could bring a civil action. Olson sued, asserting her claims of employment discrimination based on disability (Gov. Code, § 12940, subd. (a)) and on age (Gov. Code, § 12941). ARV moved to compel arbitration based on Olson's signed agreement to arbitrate disputes related to her employment. ARV, stating it did so without prejudice, withdrew the motion, stating that recent case authority disposed of Olson's suit. ARV filed an answer followed by a motion for summary judgment. The motion argued that as a matter of contract Olson's sole forum for bringing her causes of action was arbitration. She waived arbitration. Olson, therefore, had no recourse to the courts and ARV was entitled to summary judgment. The motion for summary judgment was denied.

ARV renewed its motion to compel arbitration. Olson opposed, arguing that ARV waived arbitration by answering her complaint and that, in any case, the arbitration agreement was unconscionable and unenforceable. ARV's motion to compel arbitration was granted. The arbitrator found no substantial evidence of discrimination and that

Olson was terminated from her employment based on legitimate performance issues. The arbitrator awarded costs to ARV in the amount of $5,987.33.

Olson moved for an order vacating or correcting the arbitration award. She argued ARV waived arbitration by answering her complaint, no enforceable arbitration agreement existed, the arbitrator did not provide a decision capable of judicial review and the arbitrator exceeded its power in awarding ARV costs. The trial court refused to vacate the arbitration award but corrected it by denying ARV costs.

DISCUSSION

A. *Validity and Scope of Arbitration Agreement*

Olson acknowledges a strong public policy favoring the arbitration of disputes. She notes, however, that arbitration agreements are contracts subject to the usual rules of contract formation, interpretation and validity. *(Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1327-1328.) Olson argues that while she signed an agreement that her exclusive remedy for claims arising out of her employment was arbitration, when read as a whole that agreement did not cover discrimination claims like hers brought under the California Fair Employment Act (CFEA). In the alternative she argues that the agreement is ambiguous concerning whether discrimination claims are covered by the arbitration agreement and that pursuant to the canons of construction such ambiguity must, under the circumstances, be resolved against the author of the agreement, i.e., ARV. (Civ. Code, § 1654.)

1. Background

Olson was hired in October 1992. In 1995 ARV instituted an arbitration of employment disputes policy and incorporated it into its employee handbook. The handbook was 39 pages in length and covered a wide range of employment-related subjects.

At the end of the handbook was a section entitled "Grievance and Arbitration Procedures." The section stated that to ensure impartial and speedy resolution of employment disputes the company was instituting a mandatory grievance and arbitration procedure. The procedure had four steps. The first three involved in-house review of grievances at various management levels. If this process did not resolve the issue either party could seek arbitration. The procedure required written notice to the opposing party of any claim and a demand for arbitration within one year of the date the aggrieved party first had knowledge of the event giving rise to the claim. Failure to do so rendered the claim void even if a federal or state statute of limitations gave more time to pursue the grievance.

The section states that the arbitration procedure was "the sole and exclusive means of resolving disputes between the Company, its employees and former employees."

Immediately before the statement of the grievance and arbitration procedure is a section entitled "Harassment Policy." It states that ARV was committed to a workplace free of harassment based on, among other factors, physical disability and age. It established in-house procedures for reporting and investigating harassment. The section ends with a paragraph explaining that harassment in the workplace is illegal. It states that

harassment complaints could be made to DFEH within one year of the alleged unlawful conduct. The section noted that DFEH could seek a hearing before the California Fair Employment and Housing Commission (FEHC) or file a lawsuit and that both FEHC and the courts could award monetary and nonmonetary relief.

Olson signed an acknowledgement form stating she had received and read the handbook. She stated she would comply with its policies and regulations. Olson acknowledged and stated she agreed with the terms of ARV's grievance and arbitration procedures.

3. Discussion

Olson argues that, applying standard principles of contract interpretation, ARV's handbook and her signed acknowledgment did not constitute an agreement to arbitrate FEHA claims. She asserts that at best the handbook and acknowledgment are ambiguous concerning the arbitration of such matters and that the agreement must be interpreted against its author, ARV.

Olson makes a series of observations about the handbook and acknowledgment. The acknowledgment makes no mention of FEHA claims. The grievance and arbitration section of the handbook states that the arbitration procedure is the "sole and exclusive means of resolving disputes between the Company, its employees, and former employees," but the term "disputes" is not defined and no reference is made to FEHA claims. Olson notes, however, that the harassment section of the handbook states that harassment is illegal, that complaints concerning it may be made to the DFEH which can investigate the claim and bring an administrative or civil action concerning it.

Olson argues the handbook's acknowledgement that employees can file complaints concerning harassment with the DFEH which may then take administrative or legal action creates an exception to ARV's grievance and arbitration policy. Thus, while the handbook states that arbitration is the "sole and exclusive means of resolving disputes between the Company and its employees," an exception is made for disputes covered by the FEHA. Olson notes that statutorily a component of DFEH procedure is that if the department decides to take no action it informs the employee of the right to sue. (Gov. Code, § 12965, subd. (b).) She argues, therefore, an acknowledgement by ARV that a complaint may be made to DFEH is, necessarily, an agreement that if the department does not act the employee may ignore arbitration and file suit.

Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, states that employment arbitration agreements may encompass FEHA claims. (*Id*. at pp. 93-96.) The opinion makes clear, however, that an arbitration agreement cannot waive statutory rights created by the FEHA nor can it restrict an employee's resort to the DFEH nor prevent the department from carrying out its statutory functions. (*Id*. at p. 99, fn. 6.) The necessary implication of allowing an arbitration agreement to encompass FEHA claims but preserving resort to the DFEH is that while an employee covered by an employment arbitration argument may complain to the department, if the department declines to take action the employee's only recourse is to demand arbitration.

In the present case an agreement existed between Olson and ARV to resolve all disputes between them solely and exclusively through arbitration. The harassment section of the handbook notes, however, that insofar as the dispute deals with actions or

conduct made *illegal* by the FEHA, the employee may file a complaint with the DFEH. The harassment section then relates what action the *department* may take and what remedies the *department* may seek. It does not discuss what action the employee may take if the department declines to proceed and the dispute returns to one solely between the employee and the company. The grievance and arbitration section of the handbook, however, states that all disputes between the employee and ARV must be resolved by arbitration. Thus, the most reasonable interpretation of the whole agreement is that while Olson may complain to the DFEH, if the department declines to act she must seek arbitration to resolve her private dispute with the company.[1]

Contrary to Olson's position, we conclude it is not significant that when the department declines to act it issues to the employee a right to sue letter. Because an arbitration agreement may encompass FEHA claims, the right to sue letter effectively means nothing more than the right to demand arbitration. If this were not the case then arbitration agreements could not encompass FHEA claims because in every case the arbitration agreement would be "trumped" by the department's right to sue letter.

The employment agreement in this case, with sufficient clarity, required that once DFEH declined to act Olson was required to demand arbitration.

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1 Olson makes much of the fact that the time limit under the agreement to demand arbitration is potentially shorter than the time limit given the department to decide to proceed. Thus, Olson arguably could lose her right to demand arbitration if the department took a lengthy time before declining to take action. We think this issue is better addressed in our discussion of unconscionability.

B. *Waiver of Arbitration*

Olson argues ARV waived arbitration when it withdrew its motion to compel arbitration, answered her complaint and sought summary judgment based on Olson's failure to pursue her claims through arbitration.

1. Law

While arbitration is highly favored, a party to an arbitration agreement may by conduct waive the right to compel arbitration. (*Berman v. Health Ne*t (2000) 80 Cal.App.4th 1359, 1363; *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1194.)

"There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. [Citation.] The moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration. [Citation.]" (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-212.)

Since waiver does not result merely from participation in litigation, prejudice in this context normally means "some impairment of the other party's ability to participate in arbitration." (*Groom v. Health Net, supra*, 82 Cal.App.4th at p. 1197.) Generally, the mere expense of responding to preliminary court motions, by itself, is not the type of prejudice that results in waiver. (*Ibid.*)

The burden of proof is heavy on the party seeking to establish a waiver. The issue is a factual one and the finding of the trial court concerning waiver will not be disturbed on appeal if supported by substantial evidence. (*Davis v. Continental Airlines, Inc. supra,* 59 Cal.App.4th at p. 211.)

2. Background

ARV responded to Olson's suit with a motion to compel arbitration and to stay Olson's action. Within weeks ARV, stating it did so without prejudice and based on recent case authority, withdrew its motion to compel arbitration, answered Olson's complaint and filed a motion for summary judgment. The sole issue raised in the motion was whether Olson's causes of action failed as a matter of law since she did not submit them to arbitration. The motion for summary judgment was denied.

ARV then renewed its motion to compel arbitration. It explained it had withdrawn its earlier motion to compel arbitration in light of the newly decided case of *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199. In that case the court granted summary judgment based on plaintiff's failure to submit claims to contractually required arbitration.

The trial court granted the motion to compel arbitration. It found nothing in ARV's action to be inconsistent with an intent to arbitrate the matter. While it had withdrawn its original motion to compel arbitration and filed a motion of summary judgment, the sole issue raised was whether Olson's complaint should be dismissed based on her failure to seek contractually required arbitration. The court found ARV had not acted in bad faith and granted the motion to compel arbitration.

3. Discussion

Substantial evidence supports the trial court's ruling that ARV did not waive its right to the arbitration of Olson's claims. ARV throughout this case consistently asserted in one manner or another its contractual right to arbitration. It is of no significance that ARV withdrew its original motion to compel arbitration. It did so to assert that Olson's failure to arbitrate required her lawsuit be dismissed. It raised no other issue and did nothing during the pendency of the motion for summary judgment that disadvantaged Olson in arbitration. (Compare, e.g., *Berman v. Health Net, supra*, 80 Cal.App.4th at pp. 1364-1371; *Davis v. Continental Airlines, Inc., supra*, 59 Cal.App.4th at pp. 212-217.) There was no showing of bad faith or unreasonable delay. The trial court's finding and ruling are unassailable.

C. *Unconsionability of Arbitration Agreement*

Olson argues ARV's arbitration agreement was a contract of adhesion that was procedurally and substantively unconscionable and should not have been enforced.

1. Law

Where, as here, no factual dispute exists concerning the arbitration agreement, we conduct a novo review to determine whether the contract is legally enforceable. (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion," i.e., a standardized contract which is drafted by the party of superior bargaining strength and which gives the subscribing party merely the opportunity to take

it or leave it. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 113; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 742.)

Generally, if the agreement is one of adhesion, it may still be enforced unless the contract or a provision of it does not " 'fall within the reasonable expectations of the weaker or "adhering" party' " or, considered in context, " 'is unduly oppressive or "unconscionable." ' [Citation.]" (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 113; *Blake v. Ecker, supra,* 93 Cal.App.4th at. p. 742.)

These general principles result in a two-part test. First, is the contract *procedurally unconscionable*, i.e., is the agreement adhesive, were oppressive tactics employed in securing agreement and are the terms nominally agreed upon obscure or unclear? Next, is the contract *substantively unconscionable*, i.e., are the terms agreed upon so one-sided that they shock the conscience? Simply put, is the contract or provisions of it unfair? (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114; *Blake v. Ecker, supra,* 93 Cal.App.4th at p. 742; *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329-1332.)

In order to be unenforceable a court must find that an agreement is both procedurally and substantively unconscionable. However, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at p. 174.)

2. Unconscionability of Agreement Provisions

We first consider procedural unconscionability and the issues of adhesion, oppression and obscurity of terms. The arbitration agreement in this case was a contract of adhesion. The agreement was standardized and was prepared by ARV which had a bargaining position far superior to that of Olson. The acknowledgment signed by Olson made clear she was an at will employee who could be terminated without cause. Certainly she understood that if she did not sign the acknowledgment she would be jeopardizing her employment. (See generally, *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at pp. 114-115.) While the agreement was adhesive there was no greater oppression in its presentation to Olson than is inherent in any arbitration agreement presented to any employee by any employer.

As noted above we conclude the agreement in this case can most reasonably be read as retaining Olson's right to complain to the DFEH in the first instance but requiring that any legal action taken by her and not the department proceed through arbitration. The agreement, however, is less than a model of clarity and could have more completely explained its implications, e.g., that Olson was giving up her right to a court trial or jury trial. On the other hand the agreement was not made opaque by technical or obscure language and its meaning was discoverable from its terms. (Compare *Kinney v. United HealthCare Services, Inc., supra*, 70 Cal.App.4th at pp. 1325-1327, 1329-1330.)

The agreement was, therefore, procedurally unconscionable but the degree of that unconscionability was relatively low.

Finding procedural unconscionability we address the issue of substantive unconscionability. Olson contends the agreement was substantively unconscionable in two respects. First, it required she pay part of the cost of arbitration and second, it provided a time limitation on demanding arbitration that potentially could expire before the statutory time limit for DFEH to take action on a complaint or authorize Olson to take independent action thus potentially denying her any forum to present her claims of discrimination. We agree that both provisions were unenforceable.

The ARV's arbitration policy required the company and employee share equally the fees and cost of the arbitrator. That provision of the arbitration agreement was unenforceable. At least with regard to statutory claims, an employee cannot be required "to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at pp. 110-111.)

In ordering that the matter submitted to arbitration, the trial court correctly found the provision requiring Olson to pay half the fees and cost of the arbitrator in the context of a claim of discrimination unfair and unenforceable.

In addition the time limit provided by the agreement to demand arbitration might potentially expire before the time statutorily allowed for the DFEH to act on a complaint filed by Olson. To deny Olson access to arbitration would interfere with her right to complain to the department and would be unconscionable. (See *Armendariz v. Foundation Health Psychare Services, Inc., supra*, 24 Cal.4th at p. 99, fn. 6.)

ARV's grievance and arbitration procedures require arbitration be demanded within one year of the date the aggrieved party first had knowledge of the event giving rise to the claim. The agreement states this time limitation applies even if a federal or state statute of limitations would provide a longer period.

The FEHA requires that a DFEH complaint be filed within one year of the date on which the alleged unlawful employment practice occurred. This time limit may be extended for 90 days if the employee first obtained knowledge of unlawful practice after the expiration of one year from the date of the occurrence. (Gov. Code, § 12960.) Once the complaint is filed the DFEH has 150 days to file an accusation or issue a right to sue letter. (Gov. Code, § 12965, subd. (b).) Given the time limits provided by the Government Code it is possible that the time limit for Olson to demand arbitration under her agreement with ARV would expire before her DFEH complaint was processed.

ARV cites two cases in support of its position that the one-year time limitation in its agreement for demanding arbitration is enforceable. The first, *Swiderski v. Milberg, Weiss, Bershad, Hynes & Lerach* (2001) 94 Cal.App.4th 719, can no longer be cited since review of the case has been granted by our Supreme Court. In any event *Swiderski* did not deal with claims of harassment or employment discrimination and does not speak to the issue of the nonwaiveability of statutory rights under the FEHA. The second case, *24 Hour Fitness, Inc. v. Superior Court, supra,* 66 Cal.App.4th 1199, is a case which dealt with discrimination and harassment issues and in which the employment agreement had a one-year limitation on seeking arbitration. However, the case was decided before

Armendariz, and, more importantly, did not address the issue of the propriety of that contract provision.

ARV's one-year limitation on demanding arbitration for employment discrimination actions is unenforceable.

3. Severability

When unconscionable provisions are found in an agreement, the courts may refuse to enforce the contract, enforce the remainder of the agreement or limit the application of the offensive provisions to avoid an unconscionable result. (Civ. Code, § 1670.5, subd. (a).) The choice to refuse enforcement of the contract, however, is made only when the agreement is permeated by unconscionability. In deciding the appropriate remedy we "look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz v. Foundation Health Psychare Services, Inc., supra*, 24 Cal.4th at p. 124; *Blake v. Ecker, supra,* 93 Cal.App.4th at pp. 743-745.)

ARV's agreement is not permeated with unconscionability. The requirement that arbitration be sought as a final means of resolving disputes is bilateral in every respect. Neither party is subjected to any limitation of rights not inherent in arbitration. The unenforceable provisions of the agreement are collateral to the central purpose of the agreement, are easily amended and, indeed, had no effect on this case at all. The provision of the arbitration agreement requiring a sharing of costs and placing a time

limitation on demand arbitration inconsistent with statutory time limits for the resolution of a DFEH complaints are severed and the remaining parts of the arbitration agreement are enforceable.

D. *Arbitrator's Award*

Olson argues that the written Decision Following Arbitration rejecting her claim of termination based on perceived disability did not satisfy *Armendariz's* requirement for a written arbitration decision capable of judicial review.

1. Law

Armendariz enumerated five requirements for a lawful arbitration of FEHA claims. One of those requirements is a written arbitration award sufficient for judicial review. The court noted that the usual arbitration award may not be vacated for errors of law on the face of the decision even if the error would cause substantial injustice. When dealing, however, with policy based statutory rights, judicial review of arbitration decisions may be necessary to avoid results inconsistent with the protection of those rights. (*Armendariz v. Foundation Health Psychare Services, Inc., supra*, 24 Cal.4th at pp. 106-107.)

Given its procedural context it was unnecessary *Armendariz* articulate what standard of review is sufficient to insure the arbitrator complied with the requirements of the statute. The court merely held "that in order for such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which

the award is based." (*Armendariz v. Foundation Health Psychare Services, Inc., supra*, 24 Cal.4th at p. 107.)

2. Background

In her closing arbitration brief Olson stated her claim of disability discrimination was based not on actual disability but rather on ARV's erroneous perception of her as disabled. Citing state and federal law she noted that a qualifying disability includes a physical or mental impairment that does not substantially limit major life activities but is treated by the employer as constituting such limitation, or an impairment that substantially limits major life activities only as a result of the attitude of others, or when there is no mental or physical impairment but the employer acts as if one existed.

In its closing arbitration brief ARV contradicted claims of discrimination and argued it terminated Olson based on performance failures and inadequacies.

In relevant part the arbitrator found that Olson failed to prove "that she was terminated due to a belief of the defendant that she . . . was disabled and unable to perform her duties in her specific job nor in a substantial class of jobs nor in a broad range of jobs." In a separately numbered finding, the arbitrator concluded that Olson "was terminated for legitimate performance issues and not due to any unlawful or inappropriate reasons such as age, disability or perceived disability."

3. Discussion

Olson argues the arbitrator's decision was so brief that it is impossible to determine the exact legal standard used in finding that she failed to prove that she was terminated based on perceived disability. She argues, however, it appears the arbitrator

used the wrong standard. Olson notes Government Code section 12926.1, subdivision (c), states: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act."

Olson states: "An action for wrongful termination for perceived disability under the FEHA requires that an employer take the action because of a belief that the employee suffered from a condition that limited a major life function. It does not require that the employer believe the employee is '. . . . unable to perform her duties in her specific job nor in a substantial class of jobs nor in a broad range of jobs.' "

Government Code section 12926.1, subdivision (c), however, states that " 'working is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments." Thus, the arbitrator's words can be understood simply to mean that Olson failed to prove that she was terminated because of a belief by her employer that she was mentally or physically disabled, i.e., a belief she was suffering from a limitation on a major life activity, i.e., that she could not work in her job or in a broad range of jobs. The arbitrator did not use the wrong standard in finding Olson failed to prove she was terminated based on a perceived disability.

In any event we note the arbitrator concluded unambiguously that Olson was "terminated for legitimate performance issues and not due to any unlawful or

inappropriate reasons such as age, disability or perceived disability." Any ambiguity in the arbitrator's statement of the definition of the disability involved is irrelevant.

E. *Award of Costs*

The arbitrator awarded ARV costs in the amount of $5,987.33. In Olson's petition to vacate or correct the arbitration award, she argued ARV was not entitled to cost in a suit brought under the FEHA. The trial court held that ARV would not recover costs since the arbitration agreement required each party bear its own costs. ARV argues the trial court erred in so ruling.

The arbitration agreement stated in relevant part: "Each party will pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim which affords the prevailing party attorneys' fees, or if there is an written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party."

The scope of judicial review of an arbitration award is extremely narrow. However, a central feature of nonjudicial arbitration is the right of the parties to contractually limit the arbitrator's authority. Courts are bound to uphold the parties' express agreement with regard to such limitations. "[C]ourts retain the ultimate authority to overturn awards as beyond the arbitrator's powers." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375; *California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943-945.)

We agree with the trial court that ARV's arbitration agreement required the parties bear their own costs subject to exceptions not here applicable. The trial court properly corrected the arbitration award by eliminating the award of costs.

The judgment is affirmed.

BENKE, J.

WE CONCUR:

KREMER, P. J.

NARES, J.